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NO. 73-1035

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1973

MRS. HELEN PITCHER
AND MANSON PITCHER

Petitioners

v.

IBERIA PARISH SCHOOL BOARD

Respondent

PETITION FOR WRIT OF CERTIORARI TO COURT OF APPEAL, THIRD CIRCUIT, STATE OF LOUISIANA

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CITATIONS

Cases:

Board of Regents of State Colleges v. Roth, 408 U.S. 594 — 11

Griswold v. Connecticut, 381 U.S. 479 — 18, 21

Harris v. United States, 311 U.S. 145 — 17, 18

Perry v. Sindermann, 408 U.S. 593 — 11, 5a, 7a

Constitution and Statutes:

United States Constitution:

First Amendment — 4, 1a

Third Amendment — 4, 1a

Fourth Amendment — 4, 2a

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Statutes:

La.C.C.P. Art. 2164 — 11

La.Rev.Statutes, Title 17, Sec. 413 — 7a

La.Rev.Statutes, Title 17, Sec. 442 — 5a, 7a

La.Rev.Statutes, Title 23,
Secs. 631, 632 5a, 7a

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PETITION FOR WRIT OF CERTIORARI
TO COURT OF APPEAL, THIRD CIRCUIT,
STATE OF LOUISIANA

Petitioners pray for a Writ of Certiorari to review a judgment of the Court of Appeal, Third Circuit, State of Louisiana, which affirmed judgment of the Sixteenth Judicial District Court of the State of Louisiana, dismissing

petitioner's claims under the United States Constitution.

CITATIONS TO OPINIONS BELOW

The findings of fact and conclusions of law entered by the Sixteenth Judicial District Court of the State of Louisiana (Appendix, infra, pp. 11a) are not reported. The opinion of the Court of Appeal, Third Circuit, State of Louisiana (Appendix, infra, pp. 37a) is reported at 280 So.2d 603.

JURISDICTION

The judgment of the Court of Appeal was entered on July 10, 1973, and timely application for rehearing was denied on July 30, 1973. Timely application for writ of review to the Court of Appeal was denied by the Louisiana Supreme Court on October 12, 1973 (283 So.2d 496). The jurisdiction of

this Court is invoked under 28 U.S.C. 1257 (3), since the petitioners specially set up or claim rights under the Constitution of the United States.

QUESTIONS PRESENTED

Petitioner, a public school teacher, was dismissed from her post on grounds stemming from her assertion of a constitutional right. The questions presented are:

1. Whether the due process clause of the Fourteenth Amendment grants her a right to a hearing prior to dismissal.

2. Whether there exists a constitutional right to privacy which protects her from school board inquiries into intensely personal matters.

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved are as follows:

1) The first section of the Fourteenth Amendment to the Constitution of the United States;

2) The First Amendment to the Constitution of the United States;

3) The Third Amendment to the Constitution of the United States;

4) The Fourth Amendment to the Constitution of the United States;

5) The Ninth Amendment to the Constitution of the United States.

They are set forth in Appendix A, infra, pp. 1a-3a.

STATEMENT

The instant litigation arises from the dismissal of petitioner from her position as a classroom teacher in the school system of Iberia Parish, Lou-

isiana. On March 4, 1969, petitioner filed suit in the Sixteenth Judicial District Court of Louisiana, seeking, inter alia, reinstatement in her former position, judgment for unpaid salary, and damages on behalf of the class of Iberia Parish classroom teachers injured by the allegedly unconstitutional action of respondent school board. Trial was conducted in July, 1970, and, on January 17, 1973, the District Court rendered judgment in the case.

The Court found that petitioner had been first employed by the Iberia Parish School Board in September, 1961, and had continued in its employ without interruption until June, 1966, at which time she enjoyed tenure status. In the summer of 1966, petitioner notified respondent that she did not intend to teach during the coming school year.

She then withdrew her contribution from the Teacher Retirement System in order to secure funds to help care for her daughter and grandchild, who stayed with her while her son-in-law was in military service in Viet Nam. In January, 1967, petitioner returned to her teaching job. In spring of 1968, following the normal procedure in use for the re-employment of teachers, respondent contractually engaged for the services of petitioner for the upcoming school year.

On August 14, 1968, respondent school board adopted a resolution requiring all school personnel of Iberia Parish to take a physical examination on forms furnished by respondent. The two-page form, to be completed by the employee's own physician, required numerous tests be run and detailed personal information be divulged. In the record is copious

evidence of widespread dissatisfaction with respondent's regulation among teachers in Iberia Parish. As a result of this unrest, respondent altered its resolution so that only the doctor's certificate of fitness was required to be submitted, but each teacher was still to undergo the complete examination.

On or about January 6, 1969, petitioner notified the Superintendent of Schools for the respondent that she did not intend to submit the prescribed medical forms. Among her reasons for refusing to do so was that the school board had not announced the purposes for the requirement of such a searching physical examination. On January 7, 1969, the school board adopted a resolution to the effect that any employee of the board who had failed or refused to submit to a physical examination by

a deadline of December 31, 1968, would, automatically, be considered by the board as having resigned. On January 21, 1969, the superintendent wrote to petitioner advising her that her resignation was effective and she was being replaced as of January 23, 1969. The next day petitioner replied by letter, denying her resignation and asserting her willingness to continue to work. However, respondent, relying upon petitioner's alleged "resignation", thereafter prevented her from teaching or attending class. On February 12, 1969, respondent school board formally dismissed petitioner without having granted a hearing in the matter.

Many state issues were decided adversely to petitioner in the lower courts. Of pertinence here are the finding of the District Court that petition-

er had withdrawn from the school system in 1966 and its conclusion that she had not regained tenure upon her reemployment. Its judgment was sustained by the Court of Appeal.

HOW FEDERAL QUESTIONS ARE PRESENTED

Petitioner's federal due process claim, based on denial to her of a hearing prior to her dismissal, was first raised in the Motion for New Trial pled to the District Court (Appendix B, infra, p. 4a) and was further presented to the Third Circuit Court of Appeal for the State of Louisiana by way of assignment of error. The claim was denied, neither court commenting on it in written opinion.

Petitioner's claim under the constitutional guarantee of privacy was raised in the Ditrict Court, both by

original brief and by pleading (Motion for New Trial, Appendix B, infra, p. 4a). It was denied by the District Court without written reasons therefor. Before the Third Circuit Court of Appeal on assignment of error, it was likewise denied, inferentially on the basis that the school board regulation was a reasonable exercise of the police power.

In her application for writ of review to the highest state court, the Louisiana Supreme Court, (writs denied, 283 So.2d 496), petitioner again asserted both federal claims as assignments of error.

In a civil suit in Louisiana, there is no requirement that a federal constitutional issue be raised at all in the trial court, since "(t)he appellate court shall render any judgment which is just, legal and proper

upon the record on appeal." La.C.C.P. art. 2164.

REASONS FOR GRANTING WRIT

I.

Petitioner bases her claim in part on the failure of respondent to grant her a hearing prior to dismissing her. At issue is the standard of procedural fairness which must be met by a public school board in the course of removing a teacher who asserts a constitutional protection.

This Court has recently sought to define more clearly the contours of due process in a closely analogous area. Reference is had particularly to Perry v. Sindermann, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972), and Board of Regents of State Colleges v. Roth, 408 U.S. 594, 92 S.Ct. 2701, 33 L.Ed.2d

548 (1972). Concern there was with failure of the hiring authority to renew employment of non-tenured college professors, allegedly because of their exercise of First Amendment freedoms. It is petitioner's contention that, under the tests applied in those decisions, the Fourteenth Amendment clearly grants her the right to a prior hearing.

Petitioner has suffered deprivation of a valuable property interest protected by the due process clause. Unlike the situation in Perry and Roth, petitioner was actually dismissed from the post which she held under a valid, subsisting contract of employment and was denied the opportunity to earn the contracted salary for the balance of the school year. Furthermore, even if untenured, she may fairly be said to have had an expectancy of reemployment.

She had served for nearly eight years in the school system with only one one-semester break. In addition, her status as tenured vel non was open to legitimate question at the time of dismissal, depending as it did upon judicial resolution of a mixed question of law and fact, as well as upon interpretation of an unclear statutory provision. Petitioner's interest in her job is thus clearly protected by the Fourteenth Amendment.

The due process clause minimally requires a fair hearing before deprivation of protected interests. The importance of such a hearing is manifest in the circumstances of the instant case. Satisfied that respondent's regulation infringed her constitutional right to privacy, petitioner refused to submit to the board the required certifi-

cate. From the record, it is clear that she wished an opportunity to present her objections to respondent because she felt there had been insufficient communiation between the board and the teachers on the matter. For her effort, she was dismissed, without an opportunity to be heard. Petitioner believes that the summary procedure by which she was removed violates her constitutionally-granted right of due process.

Petitioner was admittedly removed as reprisal for opposition to school board policy. There is no suggestion that she was physically disabled or otherwise incompetent, nor that her opposition had been disruptive of the normal functioning of the school. In fact, her challenge took the form of a simple refusal to submit the certificate which the school board sought from her. Fur-

thermore, she opposed the regulation in the belief that the United States Constitution protected her from its effect. The broader issue is, then, whether a teacher may effectively challenge a coercive school board regulation on the basis of its unconstitutionality. If petitioner is denied her remedy, then the answer in this case is clearly no.

II.

The second issue in this case is whether or not the parish school board, for reasons not explained to its teachers and unknown to its superintendent of education, can invade the privacy of its school teachers and require each of them to divulge his personal affairs. Inquired into were such matters as what medication he takes, whether he uses alcohol or other drugs, family history

records relative to such hereditary diseases as epilepsy, all of his noncommunicable physical deficiencies and diseases, as well as information that might indicate a susceptibility to any such defects or diseases--such information to be required regardless of the proficiency and skill of the teacher, his dedication to his work, and his conduct, whether in school or in public.

The record indicates that plaintiff had regularly taken tuberculosis examinations and had no objection to taking any medical examination for communicable diseases or other illnesses that might be transmitted to her pupils. She had informed the Superintendent of Education and other representatives of the respondent of this willingness on her part at all times pertinent to this controversy. Thus, we are confronted

with the question of how far a school board can pry into the private affairs of its teachers when such matters are not concerned with the protection of its students and employees or with the efficient functioning of the school system.

Petitioner relies upon the developing federal constitutional right to privacy. This development began with an ever-broadening interpretation of specific guarantees to individuals against unreasonable governmental intrusions.

In the words of this Court, " ...the rights of privacy and personal security protected by the Fourth Amendment ' ... are to be regarded as the very essence of liberty; and that the guarantee of them is as important and as imperative as are the guarantees of the other fundamental rights of the indi-

vidual citizen .... '" Harris v. United States, 331 U.S. 145, 67 S.Ct. 1098, 91 L.Ed. 1399 (1947).

Similarly, the Third, Fifth and Ninth Amendments to the Constitution have been invoked to invalidate governmental interference into the private affairs of individuals, as in former Justice Goldberg's concurring opinion in Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965). The opinion of the Court in Griswold, delivered by Mr. Justice Douglas, averred that "the First Amendment has a penumbra where privacy is protected from governmental intrusion." With Griswold, which dealt with attempted governmental interference into the confidential relationship between a married couple and their doctor, this Court enunciated a doctrine which petitioner believes

is applicable to her case.

The Third Circuit Court of Appeal for the State of Louisiana, in answering the constitutional objection to the school board's inquiry, noted that testimony had been offered "to the effect that all of the points covered by the medical examination were either directly or indirectly related to the teacher's ability to perform her duties either at present or in the near future." 280 So.2d at 608.

It is not disputed that a teacher's present ability to perform her duties is discoverable by the unobjectionable expedient of in-class observation. The doctor's assessment of the teacher's future ability to perform her duties was deemed by the court to be an important consideration for the planning of personnel requirements. It was

on this basis that the physical examination was excused. However, as is clear from the record, the forms which the doctors were required eventually to turn in to the school board did not reveal such information as would be necessary for the school board to engage in plotting out future personnel requirements. In the words of the Court of Appeal, "it is only the physician's ultimate conclusion, based on his findings and the history given him, regarding the fitness of the teacher to continue in her employment, that is made available to the School Board." Thus, the school board obtained no information of value that could not be obtained from mere observation of a teacher's public conduct and in-class performance.

Furthermore, even had the school board shown some relation between its

regulation and the attainment of some proper state purpose, such a showing would not be sufficient to justify an invasion of petitioner's constitutional right of privacy. Justice Goldberg in Griswold pointed out, "In a long series of cases this Court has held that where fundamental personal liberties are involved, they may not be abridged by the States simply on a showing that a regulatory statute has some rational relationship to the effectuation of a proper state purpose."

In this case we are dealing with a fundamental and traditional constitutional right which must be carefully guarded and which should not be abridged or watered down except under the most compelling circumstances. Respondent has failed to show the existence of such circumstances.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be granted.

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SARGENT PITCHER, JR.
345 Grand Pre Street
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ATTORNEYS FOR
PETITIONERS

APPENDIX A

CONSTITUTIONAL PROVISIONS

* * *

FIRST AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

Amendment I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

* * *

THIRD AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

Amendment III.

No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in

time of war, but in a manner to be prescribed by law.

* * *

FOURTH AMENDMENT TO
THE CONSTITUTION OF
THE UNITED STATES

Amendment IV.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

* * *

NINTH AMENDMENT TO
THE CONSTITUTION OF
THE UNITED STATES

Amendment IX.

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

* * *

FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

Amendment XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

APPENDIX B

RAISING FEDERAL QUESTION IN STATE COURT

* * *

THE SIXTEENTH JUDICIAL DISTRICT COURT IN AND FOR THE PARISH OF IBERIA, STATE OF LOUISIANA

MRS. HELEN PITCHER, nee Shirley, ROBERT MANSON PITCHER, THE CLASSROOM TEACHERS OF IBERIA PARISH, ET AL — NO. 28,668

VS. — FILED _____

IBERIA PARISH SCHOOL BOARD — _____ CLERK

MOTION FOR NEW TRIAL

Now comes MRS. HELEN PITCHER and MANSON PITCHER, plaintiffs, through their undersigned counsel, and moves the Court to set aside the judgment rendered and signed on the 17th day of January, 1973, and to grant a new trial on the grounds that the judgment is clearly contrary to the law and the evidence, more particularly for the following reasons:

1. The Court erred in holding that Mrs. Pitcher was not entitled to a hearing even though the School Board's action in summarily "accepting Mrs.

Pitcher's resignation" without a hearing, was based upon her objection to the Board's invasion of her constitutionally protected right of privacy under the Fourteenth Amendment to the United States Constitution. Perry v. Sindermann, 408 U.S. 593, 33 L.Ed.(2) 570, 92 S.Ct. 2694 (1972).

2. The Court erred in holding that Mrs. Helen Pitcher was not a fully tenured teacher at the time of her arbitrary dismissal. 17 L.R.S. 442.

3. The Court erred in permitting the School Board to violate the contractual rights of Mrs. Pitcher to teach for the full school year. 17 L.R.S. 413.

4. The Court erred in denying Mrs. Pitcher's claim under the Continuing Wage Statute. 23 L.R.S. 631, 632.

5. The Court erred in dismissing the class action, since the constitutionally protected rights of each of the teachers of Iberia Parish, as well as that of Mrs. Pitcher, were violated by the arbitrary, unconstitutional and illegal action of the Iberia Parish School Board in attempting to require these teachers to divulge personal habits, family medical records unrelated to school teaching, and similar private data under the guise of a so-called "medical examination".

WHEREFORE, movers pray that after a contradictory hearing, there

be judgment herein, annulling, setting aside and avoiding the above described judgment of this Honorable Court and granting a new trial herein.

S H A W A N D S H A W
Post Office Drawer 420
Homer, Louisiana 71040

BY: /s/ W. M. Shaw
W. M. Shaw

ATTORNEYS FOR MOVERS

ASSIGNMENTS OF ERROR,
AS LISTED IN BRIEF ON APPEAL
TO THIRD CIRCUIT COURT OF APPEAL

1. The Trial Court erred in holding that plaintiff, Mrs. Pitcher, was not a fully tenured teacher and, hence, subject to dismissal without the hearing provided by the Teachers' Tenure Law. 17 L.R.S. 442.

2. The Trial Court erred in holding that plaintiff, Mrs. Pitcher (or for that matter, any teacher in the Iberia Parish School system, whether tenured or not) could be dismissed from office by the School Board's "acceptance" of a fictitious resignation which was never given followed, some month or more later, by a written recommendation of the parish superintendent approved by the School Board, all the while being deprived of her contractual right to teach the full school year and to receive monthly compensation therefor. 17 L.R.S. 413 and 442.

3. The Trial Court erred in holding that the School Board could dismiss plaintiff, Mrs. Pitcher, without a hearing because of her objection to the Board's invasion of her constitutionally protected right of privacy under the Fourteenth Amendment to the Constitution of the United States. Perry v. Sindermann (supra).

4. The Trial Court erred in holding that the so-called "physical examination" which inquired into non-communicable hereditary diseases such as epilepsy; personal habits such as the use of alcohol or drugs; a history of any past mental or emotional illness; amputation of digits such as toes; whether or not the teacher was color blind and many other matters completely irrelevant to the ability of the teacher to perform her duties; was a reasonable exercise of defendant School Board's discretion under L.R.S. 17:81, and not a gross violation of the plaintiff's right of privacy under the Fourteenth Amendment.

5. The Trial Court erred in holding that the defendant School Board's delegation to the examining physician of the right to deprive a teacher of her employment was a proper and legal exercise of the powers and privileges granted to the defendant School Board by the Constitution and laws of Louisiana.

APPENDIX C

OPINIONS AND JUDGMENTS BELOW

* * *

MRS. HELEN PITCHER, ET AL	16TH JUDICIAL DISTRICT COURT
VS. DOCKET NO. 28,668	PARISH OF IBERIA
IBERIA PARISH SCHOOL BOARD	STATE OF LOUISIANA

J U D G M E N T

This matter after being duly tried was submitted to the court for decision, and the court being of the opinion for the written reasons dated October 10, 1972 that the law and the evidence is in favor of defendant and against plaintiffs:

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that Mrs. Helen Pitcher is entitled to the recovery of the sum of $600 representing salary due to her between the dates of January 22, 1969 and February 12, 1969 and the Clerk of Court is hereby authorized to deliver to Mrs. Helen Pitcher Check No. 7222 of the Iberia Parish School Board in the amount of $600, the said check being attached to the stipulation of counsel, Item Nos. 14 and 15.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment here-

in in favor of the Iberia Parish School Board and against Mrs. Helen Pitcher and Manson Pitcher dismissing their individual and class actions asserted in the above numbered and entitled proceedings, all at their cost.

THIS JUDGMENT RENDERED AND SIGNED IN OPEN COURT AT NEW IBERIA, IBERIA PARISH, LOUISIANA ON THIS 17th DAY OF JANUARY, 1973.

/s/ Edward A. dela Houssaye, III
DISTRICT JUDGE

Submitted by:

/s/ Leon E. Roy, Jr.
LEON E. ROY, JR.
ATTORNEY FOR DEFENDANT
Post Office Drawer 939
New Iberia, Louisiana 70560

Approved as to form only:

/s/ W. M. Shaw
W. M. SHAW
ATTORNEY FOR PLAINTIFFS
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Homer, Louisiana 71040

Filed Jan. 17, 1973
Time: 10:01 A. M.
/s/ Vernis Resweber
Patrick Saunier, Dty.Clerk

MRS. HELEN PITCHER, ET AL	§	16TH JUDICIAL DISTRICT COURT
VS. NO. 28,668	§	PARISH OF IBERIA
IBERIA PARISH SCHOOL BOARD	§	STATE OF LOUISIANA

REASONS FOR JUDGMENT

STATEMENT OF THE CASE

This is a suit seeking (1) a reinstatement of plaintiff, Mrs. Helen Pitcher, as a classroom teacher in the Iberia Parish School System; (2) judgment for her unpaid salary as a school teacher from January 23, 1969, until paid, together with legal interest thereon; (3) a declaration that said plaintiff, Mrs. Helen Pitcher, is a fully tenured teacher in the Iberia Parish School System; (4) that the resolution of defendant, Iberia Parish School Board of August 14, 1968, requiring a physical examination in the manner and on the forms provided by them was unconstitutional, null and void; (5) a declaration that the coercion of the classroom teachers of Iberia Parish requiring them to take a physical examination, as aforesaid, damaged the said classroom teachers, as a class, in the amount of Seventy-Five Thousand ($75,000.00) Dollars, together with legal interest thereon, for which they claim they are entitled to recover against said defendant; and (6) a judgment for reasonable attorney's fees to be fixed by the court and all expenses of the litigation, both past, present and anticipated.

The case was duly tried, argued, briefed and submitted.

FACTS

The facts in this case, while giving rise to serious and complex questions of law, are not in themselves seriously contested.

The plaintiffs are husband and wife, residents of Iberia Parish, Louisiana, where plaintiff, Mrs. Helen Pitcher, was first employed to teach in September 1961, by defendant. (TR 110-111) Mrs. Pitcher continued to teach each semester without interruption, through the school year ending in the Spring of 1966. (TR 23,77) There is no serious contest of the fact that as of June 30, 1966, Mrs. Pitcher was a tenured teacher. (TR 78)

At the end of the school year (June 30, 1966), Mrs. Pitcher, in response to a questionnaire, advised the School Board that she did not plan to remain in its employ during the coming school year (1966-67) (Stipulation of Counsel, Item 17). Mrs. Pitcher's stated reason for so notifying the School Board was that her son-in-law who was in military service had been sent to Viet Nam and her daughter and granddaughter were living with the plaintiff. (Plaintiffs' Exhibit #2, p. 9, L 28 et seq.)

At or about this time, Mrs. Pitcher also applied to the Board of Trustees of Louisiana School Employees Retirement System asking for return of

the contributions which she had paid into the system. (TR 28-30). The form which she filled out for this application was a printed statement stating that she was not then employed and did not intend to be employed again in the public schools of Louisiana. (Stipulations of Counsel, Item 16) (TR 28). The same form contained a paragraph addressed "Dear Superintendent" which again stated that, "I am not now employed and do not intend to be employed again in the public schools of Louisiana"; further stating her desire to withdrawing her accumulated contribution and requesting the then superintendent to affix his signature. Mrs. Pitcher admits that the signatures on these forms are her own. (TR 30) Thereafter, on part two of said form (Item 16), the then superintendent certified that plaintiff had left the service of the Public Schools of Louisiana and was no longer employed therein, having been terminated on June 30, 1966. (Item 16, Stipulation of Counsel).

Mrs. Pitcher stated that, this was not the first time that she had withdrawn her contribution from the retirement system, having done so once before when she took a year's sabbatical leave while teaching in the Parish of East Baton Rouge, and that she withdrew the funds in 1966, because they were needed in order to help with the care of her daughter and grandchild who were staying with her. She further stated that, she never intended to declare that she was permanently withdrawing from the Iberia Parish School System, although

the printed form which she signed may have contained such a statement. (TR p. 28 L 2 et seq.).

In January 1967 following the 1966 Fall semester, Mrs. Pitcher returned to her teaching job at the New Iberia Junior High School and taught there continuously until January 22, 1969. (TR pp. 24,78).

The Iberia Parish School Board, in procuring its classroom teachers for the coming school year, used a system of questionnaires and letters of assignment. These questionnaires are sent out in the Spring to teachers already teaching to inquire if they wish to continue to teach in the schools? When this information has been obtained, the School Board then prepares and sends out, so-called, "letters of assignment", stating that the particular classroom teacher is assigned to a designated school for the upcoming school year. (Plaintiffs' Exhibit #3, p. 4, L. 22 et seq.). This procedure was followed in the case of Mrs. Pitcher and she received her letter of assignment to the New Iberia Junior High School for the school session 1968-1969. (Stipulations of Counsel, Item #2.). This procedure was completed sometime around the month of March, 1968, and the plaintiff considered her employment for the ensuing school year to have been settled by this type of contractural arrangement as of that time. (Plaintiffs' Exhibit #2, p. 8).

On August 14, 1968, the defend-

ant School Board adopted a resolution requiring all school personnel of Iberia Parish to take a physical examination on forms to be furnished by the School Board. (Stipulations of Counsel, Item #2). The form required to be completed by the employee's own physician, contained two pages and covered numerous tests, examinations and detailed personal information about the subject of the examination. It also contained at its conclusion, a certificate by the examining physician to the effect that he had "examined the person and found him/her to be free in accordance with the items listed above, from any ailments, disease or defect that might affect his ability to perform his duties for the Iberia Parish School Board." (Item 3, Stipulations of Counsel; Plaintiffs' Exhibit #1). It had been the custom of Mrs. Pitcher to have an examination for tuberculosis every year and plaintiff testified that she never objected to, and had always been willing to undergo any type of examination or test for communicable diseases. (TR p. 27).

It appears from the evidence that, subsequently, the School Board modified its directives to provide that, although the information originally demanded on the forms must be furnished to the examining physician, the examining physician would only be required to return to the School Board that portion of the examination stating whether or not in the doctor's opinion the subject of the examination was free from such defects or diseases as might af-

fect his ability to perform his duties (hereinafter referred to simply as the Certificate of Fitness). (See TR p. 83).

In furtherance of the August 14, 1968, resolution requiring a medical examination, the School Board, at its meeting of January 7, 1969, adopted another resolution to the effect that, any employee of the Board who had failed or refused to submit to a physical examination by a deadline of December 31, 1968, would be considered by the Board as having resigned. The superintendent was directed to call in any such employee and inform him/her of the School Board decision.

On or about January 6, 1969, the plaintiffs, Mr. and Mrs. Pitcher had conferred with Mr. Duhon, Superintendent of Schools for the defendant, and during this conference had informed Mr. Duhon that, Mrs. Pitcher did not intend to submit the prescribed medical forms. She gave as her reasons for refusing to do so; (1) that it was a requirement imposed upon her after her contract had been signed, and (2) that the School Board had not announced adequate and sufficient reasons for the requirement of the physical examination. (TR p. 42). Mrs. Pitcher admits that Mr. Duhon advised her prior to her discharge that she would not be required to submit the entire form, but only the certificate of fitness. (TR 41-42 and TR 46-47). The evidence further reflects that, Mrs. Pitcher actually had the physical examination performed by her per-

sonal physician, Dr. Oscar Alvarez (TR p. 36), and also had x-rays made at the Iberia Parish Health Unit. (TR p. 36). Dr. Alvarez told Mrs. Pitcher that she was fit to teach and he would sign the certificate before Mrs. Pitcher went to see Mr. Duhon. (TR p. 39).

Acting pursuant to the School Board's resolution, Mr. Duhon wrote to Mrs. Pitcher on January 21, 1969, advising her that, the Board considered her refusal to be an act of resignation as a classroom teacher, and that she was being replaced as of January 23, 1969. (Stipulations of Counsel, Item #7).

By letter dated January 22, 1969, Mrs. Pitcher replied to Mr. Duhon's letter of January 21, advising that she had not resigned, and was willing to continue to work. (Stipulations of Counsel, Item #8.).

On January 29, 1969, Superintendent Duhon wrote the Iberia Parish School Board (Stipulations of Counsel, Item #9) advising the Board that, all teachers employed by the Board, except Mrs. Pitcher, had complied with the order requiring the taking of the physical examination. He stated that, he had discussed the matter with Mrs. Pitcher and made her aware of the Board's policy. He then, after expressing his understanding that Mrs. Pitcher was a probationary teacher, recommended her dismissal on the grounds of neglect of duty for failure to comply with rules and regulations of the Board. This recom-

mendation was accepted by the Board by action dated February 12, 1969. (Item #10, Stipulations of Counsel). Mrs. Pitcher was informed of the Board's action by letter from Mr. Duhon dated February 14, 1969, effective February 12, 1969. (Item #11, Stipulations of Counsel).

In spite of the above-referenced letter of January 21, Mrs. Pitcher continued to report to her school daily from January 23 until February 7, but she was not permitted to teach and had, in fact, been replaced by another teacher. (TR p. 76). Mrs. Pitcher's pay was stopped as of January 23 and no tender of her monthly payments were made during the rest of the school term.

However, by letter dated June 3, 1969, from Leon E. Roy, Jr., Assistant District Attorney, to Mr. W. M. Shaw, attorney for Mrs. Pitcher, Mrs. Pitcher was tendered a check, No. 7222, from the School Board in the amount of $600.00, tendered in payment of salary due her between the dates of January 23, 1969, and February 12, 1969, (the date of the School Board's action dismissing her). (Items #14 and #15, Stipulations of Counsel). This tender was rejected.

It is noted that, by stipulation of counsel, there were 662 classroom teachers employed by the Iberia Parish School Board in the year 1968-69. All teachers, except Mrs. Pitcher, had turned in forms or verbally committed themselves to do so, by December

30, 1968. (Duhon, p. 14; TR p. 15). As of the date of Mr. Duhon's deposition (May 23, 1969), all teachers except Mrs. Pitcher had furnished certificates. (Duhon, p. 15).

The superintendent never received any petitions, verbal or written; no protests or personal commmunications from teachers protesting the required physical examination, other than from Mrs. Pitcher. (Duhon, p. 35).

It appears that, throughout all of these trying times the parties maintained courteous and respectful relations toward each other. At no time was it ever suggested that Mrs. Pitcher's actions were insincere or impertinent, but rather that, she was acting in a sincere effort to protect and enforce rights which she held dearly. Likewise, the School Board and its superintendent acted in accordance with what they considered to be in the best interests of the School Children of Iberia Parish, and without malice, animosity or disrespect toward Mrs. Pitcher. Nor, has it ever been suggested that, Mrs. Pitcher was not a good teacher.

LAW, DISCUSSION AND HOLDING

Before addressing itself to a decision on the issues presented, the court should reiterate the limited nature of judicial review in instances such as the present. STATE EX REL RATHE V. JEFFERSON PARISH SCHOOL BOARD, 206 La 317, 19 So.2d 153, is perhaps the leading decision on Judicial review of

school board's disciplinary actions against tenured teachers. In its opinion, our State Supreme Court stated, 19 So.2d 167:

> "There is nothing more firmly established in law than the principle that, within the limits of their authority, the power and discretion of legally created governing boards is supreme. Their wisdom or good judgment cannot be questioned by the courts. Members of these boards are appointed or elected because of their peculiar fitness for the post. Judges are elected because of their legal knowledge and ability. They are not experienced in the business affairs of parishes or municipalities * * * or the conduct of a public school system. A presumption of legality and regularity attaches to the action of all government boards. It is only when it is clearly shown that the action of such a board is beyond its authority or is arbitrary, unreasonable or fraudulent that a court is justified in interfering."

The Court also stated, 19 So2d 167-178:

> " * * * It is indisputable that the jurisprudence of this state is settled beyond doubt that where a statute creates a board and grants to it certain administrative and executive functions and responsibilities, the courts will not interfere with the bona fide judgment of the board based upon substantial

> evidence. It is only where the complaintant shows there has been an invasion of his rights by the board exceeding its powers or doing him an injustice that the courts have set aside the actions of the board * * *".

In recent summary in MOFFETT V. CALCASIEU PARISH SCHOOL BOARD, 179 So.2d 537, 539, The Court of Appeal, Third Circuit, held:

> "Generally, the scope of review of administrative agencies, although varying with the statutes involved, is limited to a determination of whether the action of the agency was: (1) in accordance with the authority and formalities of the statute; (2) supported by substantial evidence; and (3) arbitrary or an abuse of discretion. STATE EX REL MC AVOY V. LA. STATE BOARD OF MEDICAL EXAMINERS, 238 La 502, 115 So.2d 833; STATE EX REL WILLIAMS V. AVOYLLES PARISH SCHOOL BOARD, 147 So.2d 729 (La. App. 3rd Ct. 1962); 73 C.J.S. Verbo Public Administrative Bodies and Procedure, Sects. 202-210, p. 548 et seq.. Except for these purposes, the Court will not review the wisdom reasoning or judgment of administrative agencies, for to do so would substitute the discretion of the court for that of the agency."

Our Third Circuit has further noted that Parish School Boards are authorized by statute to make and adopt

rules and regulations not inconsistent with law or with regulations of the State Board of Education. L.S.A.-R.S. 17:81. A tenured teacher may be disciplined or discharged for failure to comply with reasonable regulations which are adopted for the proper administration of the schools. STATE EX REL CODY V. CALDWELL PARISH SCHOOL BOARD, 125 La. 645, 41 So.2d 461; REED V. ORLEANS PARISH SCHOOL BOARD, La. App. Orl., 21 So.2d 895; BLANCHET V. VERMILLION PARISH SCHOOL BOARD, 220 So.2d 534 (Ct. App. 3rd Cir., 1969).

Thus, it would appear that the court must first test the action of the School Board in adopting its resolution requiring the physical examination in the light of the threefold test of the jurisprudence stated above in order to determine whether the court should review the Board actions.

Initially, it is observed that the legislature has never conferred specific authority on school boards to require physical examinations of its teachers. However, the legislature has conferred broad general powers on the school boards of this state. Thus,

> "Each school board is authorized to make such rules and regulations for its own government, not inconsistent with law or with regulations of the Louisiana State Board of Education, as it may deem proper." LSA-R.S. 17:81.

It is the exercise of this broad discretion that plaintiffs' question.

However, the court has not been referred to, nor has its own research uncovered any statute or regulation of the State Board of Education prohibiting a school board from requiring a physical examination of its teachers. Therefore, since there is no such prohibition, the court must determine whether the board acted in an arbitrary or discriminatory manner.

The reasons given for the adoption of the subject resolution are shown in the testimony of Dr. J. L. Comeaux, a physician and school board member, who authored the resolution. (TR pp. 9-14). Dr. Comeaux stated as his first reason that at the time there was a regulation of the State Board of Education requiring school bus drivers to take a physical examination, and also one requiring cafeteria workers to take a physical examination, the Board felt that it would be discriminating against these two classes of employees by not requiring an examination of all employees.

The second reason given (TR 13) was so that the School Board, as the employer of these persons, could reasonably anticipate and provide for their personnel needs; i.e., determine which employees were physically able or unable to perform their duties.

The third reason was to determine whether any of the teachers or employees were carriers of communicable diseases. Dr. Comeaux cited the example of an incident which occurred in

Detroit, Michigan, in the Spring of 1968 (TR 14) where in a kindergarten class twenty children developed tuberculosis and of these twenty, four or five or ten of the children died. He said,

> "We felt that if this were prossible (sic) in a kindergarten class, it could be possible in any class. And, the School Board felt that we were not only responsible for educating the children, but we were also responsible for their physical and mental well-being." (TR p. 14).

In subsequent testimony, Dr. Comeaux testified that, while certain items listed on the physical examination were not dealing strictly with communicable diseases; such as, the use of narcotics, history of mental lapses or derangement, epilepsy, diabetes, etc., information regarding these ailments were deemed necessary in order to determine the ability of a teacher or other employee to perform their duties.

Dr. Murphy Martin, Director of the Iberia, Lafayette and St. Martin Parish Health Units, with a Masters Degree in Public Health, testified in great details concerning the communicable diseases which might be brought out by completion of the form by an examining physician. (TR. p. 116 et seq.). He stated that, evidences of non-communicable diseases such as epilepsy and diabetes might cause a temporary loss of consciousness. (TR. p.128). See also his testimony at page 131 of the tran-

script relative to the need of the school administration to know of conditions which might affect future employment. He considered the form to be satisfactorily complete. (TR. p. 131). He stated that, a good purpose is served by the Board requiring these physical examinations. (TR. p. 143).

Thus, examined in the light of the foregoing evidence, this court cannot hold that the action of the School Board, in requiring a physical examination of its teachers and other employees, was either arbitrary, discriminatory or unreasonable. All employees were required to take the examination, and this was done to avoid discriminating against only bus drivers and cafeteria workers. The School Board has a legitimate interest in determining the physical fitness of its employees to determine such matters as availability, replacement needs, promotion possibilities, or transfers; possible limitations of ability, etc.. And, finally, the School Board most certainly has a right to determine whether or not a teacher, or indeed any employee, has either a communicable disease which might be transmitted to the students, or some other non-communicable disease or infirmity which might seriously impair that teacher's ability or fitness to perform his duties satisfactorily. Certainly, viewing the Board's action in light of the case in Detroit, Michigan, and in recognition of the Board's duty to provide for the physical well-being of its students, its actions cannot be deemed arbitrary or unreasonable.

Plaintiffs argue that the Board's actions were arbitrary in view of R.S. 17:156, which provides that:

> "No student shall be subjected to any physical examination or inspection if the father, mother, or tutor of such student objects thereto."

Plaintiffs argue that, by providing that no student can be required to submit to a physical examination, that by implication, no teacher should be so required. The argument is without merit. Teachers are employees of the Board; students are not. It could also be argued that, if the legislature had intended to prohibit the School Board from requiring physical examinations of teachers they would have done so, and the fact that they did not do so, considered with the broad grant of powers to the school boards, ante, indicates the legislature did not intend to deny school boards the right to require examinations of teachers. Finally, plaintiffs do not suggest what action a given school board might take if a student or his parents refused to take an examination. He could be suspended or dismissed. This argument is without merit.

It must be remembered that, the School Board modified its original requirement in that it would not require the entire form to be submitted, but only the certificate of fitness, and that Mrs. Pitcher was made aware of this prior to her discharge. Much of her opposition to the physical was that the

information contained on the entire form would be filed in the School Board's records, available for inspection. The modification requiring the submission of only the certificate of fitness eliminated these contentions.

Therefore, the court holds that, the action of the Iberia Parish School Board, in adopting its resolution requiring its employees to submit to a physical examination, was (1) done in accordance with the broad powers and discretion afforded to it by the statute (R.S. 17:81); (2) was supported by the substantial evidence, particularly the testimony of Drs. Comeaux and Martin, and was neither arbitrary, discriminatory, or an abuse of discretion.

The court is fortified in its holding by two decisions of our appellate courts. In WEISGERBER V. EAST BATON ROUGE PARISH SCHOOL BOARD, 81 So.2d 471 (Ct. App. 1st Ct. 1955). The school board, acting upon the recommendation of the State Department of Education, adopted the requirement that all school bus drivers who had reached the age of sixty years would be required to submit to two annual examinations. Mrs. Weisgerber, having reached sixty years, was notified to submit to the examination, and was found, after three examinations, physically unfit to perform her duties. She was called to the superintendent's office, notified of the finding, and her resignation was requested. She refused to resign and the superintendent recommended to the board that she be discharged. She was a per-

manent school bus driver. After a hearing, the school board discharged her.

The bus driver contended she was illegally discharged; that the school board was without authority to establish any standard of physical fitness for permanent bus drivers; and that the actions of the school board were arbitrary and discriminatory.

The school board contended it has the right to make any and all reasonable regulations in adopting standards of physical fitness for school bus operators, that such adoption is purely discretionary, and that the discretion was not abused; that in the interest of the safety and welfare of school children who are transported upon school busses, it has the right and authority to legally set up standards of physical fitness for the bus operators.

The First Circuit, citing R.S. 17:81 and CROWELL V. JACKSON PARISH SCHOOL BOARD, La. App. 28 So.2d 81 at page 83, and HILL V. DE SOTO PARISH SCHOOL BOARD, 177 La. 329, 148 So. 248, at page 250, held:

> "Under the discretion given by law to school boards (R.S. 17:81), they clearly have the authority to adopt regulations requiring all drivers who have attained sixty years of age to submit to a physical examination and if such drivers, as a result of such an examination, are found physically unfit to perform their duties, it has the right to

> discharge them. The plaintiff was discharged not because of any moral turpitude, but because she was, after competent medical examinations, considered to be physically unfit to operate a school bus, as her physical impairment would possibly jeopardize the safe transportation of school children. We do not find the board to have acted arbitrarily, unreasonably or fraudently. (Emphasis mine.) 81 So.2d 471, 474.

Thus, in a very similar situation involving a permanent school bus driver, the court held that the school board had not abused its discretion in requiring a physical examination of said driver. The same reasoning is applicable here.

The second case which supports the courts' holding is that of BLANCHET V. VERMILLION PARISH SCHOOL BOARD, 220 So.2d 534 (Ct. App. 3rd Cir., 1969).

In that case, Blanchet, a tenured teacher, was discharged for willful neglect of duty because he refused to wear a necktie, contending that a new parish regulation requiring teachers to do so was unreasonable, illegal and unconstitutional.

In affirming the district court, upholding the teacher's dismissal, the third circuit, citing RATHE V. JEFFERSON PARISH SCHOOL BOARD, 206 La. 317, 19 So.2d 153, and MOFFETT V. CALCASIEU PARISH SCHOOL BOARD, 179 So.2d 537, 539, supra, as well as R.S. 17:81, and the

evidence in the case, held:

> "We are unable to hold that the regulation in question is so unsupported by substantial evidence and reason as to be beyond the power of the defendant school board to adopt, having in mind the presumption of regularity and validity that attaches to discretionary school agency actions and lack of power of a court to substitute its views for the school boards when there is a rational basis for the latter's discretionary determination." 220 So.2d 534, 539.

Obviously, our court of appeal for the third circuit decided that a school board, upon a proper showing of evidence, has the discretion to require a tenured teacher to wear a necktie to school, and to discharge him for his failure to do so. If then that is a proper exercise of the great discretion afforded to school boards, how much more pertinent, valid, reasonable and appropriate is the adoption of a resolution requiring school employees and teachers to submit to an annual physical examination to determine their fitness in order to insure the safety and physical well-being of the children who attend school?

In this case, plaintiff vigorously contends that her rights to contract have been impaired by the adoption of the resolution after her contract was entered into. The same issue was raised in the Blanchet case, supra,

and dismissed by the court, stating:

> "The adoption of the regulation did not impair the obligation of any prior 'contract' for the school year 1967-68, since tenured school teachers are always subject to reasonable change of regulation by the school board." 220 So.2d 534, 539.

Having thus decided that the action of the school board was valid and proper, and not arbitrary and discriminatory, the court next will discuss plaintiff's contention that she was illegally discharged.

Mrs. Pitcher contends that she was discharged January 22, 1969. The School Board contends that she terminated her employment on June 30, 1966, by her resignation and withdrawl (sic) of retirement funds, although the facts show she returned to her teaching duties in January 1967, and taught until January 22, 1969. The question as to her status as a tenured teacher is important because the method or procedure for discharging a tenured teacher is different from that of a probationary teacher.

R.S. 17:442 provides, inter alia, that, each teacher shall serve a probationary term of three years to be reckoned from the date of his first appointment in the parish or city in which the teacher is serving his probation. During the probationary term, the parish school board may dismiss or discharge any probationary teacher upon

the written recommendation of the school superintendent, accompanied by valid reasons therefor.

R.S. 17:443 provides the procedure for removal of permanent or tenured teachers. In general, it provides, inter alia, that a teacher shall not be removed, except upon written and signed charges for stated grounds, and then only if found guilty after a hearing by the school board. It requires that the teacher be furnished a written copy of the charges at least fifteen days in advance of the hearing, and provides the teacher the right to appear at the hearing with counsel and call witnesses. It further provides the right of appeal.

In this case, the evidence shows that Mrs. Pitcher was not given a written notice of charges; not afforded a hearing; hence, not dismissed by the Board after such a hearing. The Board, as aforesaid, considered her to be a probationary teacher and treated her as such.

No cases have been furnished to the court, nor has the court's research found any case deciding the question as to what affect the voluntary retirement or cessation of teaching, followed by a withdrawal of contributions and accrued interest from the Annuity Savings Fund (under R.S. 17:917), has upon a teacher's status as a permanent or tenured teacher.

Mrs. Pitcher argues that once

she acquired tenure in the Iberia Parish School System, she retained it permanently, notwithstanding her voluntary retirement; hence, she was a permanent or tenured teacher who could only be dismissed in compliance with R.S. 17:443.

It appears that this question is res novo in Louisiana. There is no question but that Mrs. Pitcher had acquired tenure or permanent status as of the date of June 30, 1966, the date of her termination, because of her family committments, she began teaching in Iberia Parish in September 1961 (TR. pp. 110-111). When she resigned in 1966, and applied to the Board of Trustees for withdrawal of her accumulated funds (Item 17, Stipulation of Counsel), she certified over her signature that she "was not now employed and do not now expect to be again employed in the public schools of Louisiana." She enclosed her certificate of membership. She now claims her intentions were not to permanently cease her teaching career.

However, the court must view a party's actions with regard to the effect on both parties. When she resigned on June 30, 1966, it became necessary for the school board to replace her with another teacher. If the court were to adopt Mrs. Pitcher's view that she was a tenured teacher, then when, as, and if she ever returned, whether in six months or six years, the School Board would have to give her her same job back, and perhaps dismiss the substitute teacher. What would happen if, instead of being a teacher, Mrs. Pit-

cher had been a principal of a school? If she took the same action and the Board promoted another teacher to be principal, and then months or years later, Mrs. Pitcher returned and demanded, as a tenured teacher, her former position as principal, would the School Board be compelled to fire or demote a principal in order to restore Mrs. Pitcher to her former position? When viewed in this light, such action could and would lead to absured (sic) consequences. Relying on the old axiom that parties must accept the responsibility for their own actions and conduct, the court must adopt the more reasonable view, and, therefore, hold that notwithstanding the fact that Mrs. Pitcher was a permanent or tenured teacher on June 30, 1966, when she resigned and withdrew her funds, certifying that she was not then and did not again intend to be employed in the public schools of Louisiana, that she forfeited her rights as a tenured or permanent teacher. Therefore, when she returned to her teaching duties in January 1967, she did so as a probationary teacher. She would, therefore, not have again acquired permanent or tenured status until January 1970, and since she was discharged on January 22, 1969, she was not a tenured teacher at the time of her discharge, and, therefore, the School Board's dismissal of her under the provisions of R.S. 17:442, as a probationary teacher, was proper.

However, the court notes that while she was discharged as of January 22, 1969 (TR. pp. 24,78), the school

board did not act on the recommendation of the superintendent until the meeting of February 12, 1969. (Item Nos. 10 and 11, Stipulations of Counsel). Hence, Mrs. Pitcher is entitled to be paid her salary between the dates of January 22, 1969, and February 12, 1969, which is represented by the School Board's check in the amount of $600.00. (Item Nos. 14 and 15).

Thus, the court has held that the School Board's action was neither arbitrary, unreasonable or discriminatory, supported by substantial evidence, and that Mrs. Pitcher's discharge as a probationary teacher was valid.

The court must then only hold that since Mr. and Mrs. Pitcher's suit must fall, likewise, the class action on behalf of all other teachers and their husbands must fall. But as an additional reason for dismissing the class action, the court finds that of all 662 classroom teachers in the Iberia Parish School System for the 1968-1969 year, Mrs. Pitcher alone failed to submit the certificate of fitness, all other teachers having done so. Obviously, as a matter of fact, Mrs. Pitcher could not adequately represent them in a class action since they acquiesced in or complied with the requirement.

Likewise, plaintiffs' suit for damages and attorney's fees must, in accordance with the foregoing reasons, be rejected and dismissed at her costs.

A formal judgment in accord-

ance with these reasons will be rendered, read and signed in open court when presented to the court for that purpose.

THUS DONE AND SIGNED in Chambers at Franklin, St. Mary Parish this 10th day of October, A.D., 1972.

/s/Edward A. dela Houssaye,III
Edward A. dela Houssaye, III
District Judge

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/s/ Rose Mary L. Breaux
Deputy Clerk of Court
Parish of Iberia, La.

NO. 4213
COURT OF APPEAL, THIRD CIRCUIT
STATE OF LOUISIANA

MRS. HELEN PITCHER, ET AL
Plaintiffs - Appellants

VERSUS

IBERIA PARISH SCHOOL BOARD
Defendant - Appellee

Appeal from the Sixteenth Judicial District Court, Parish of Iberia, State of Louisiana; Hon. Edward A. Delahoussaye, III, District Judge, Presiding.

Before SAVOY, MILLER, and DOMENGEAUX, JUDGES

SAVOY, JUDGE.

Plaintiff, Mrs. Helen Pitcher, was discharged from her position as a classroom teacher in the Iberia Parish Schools, by the School Board of that parish. The dismissal of plaintiff was a consequence of her failure to comply with a newly instituted policy of the School Board that required all classroom teachers to submit to an annual physical examination, by a physician of their choice, and to have the physician forward to the School Board his opinion of the teacher's fitness to teach.

Plaintiff and her husband filed suit on March 4, 1969, against the School Board seeking her reinstatement, damages and attorney's fees, and in addi-

tion they brought a class action on behalf of all classroom teachers in Iberia Parish seeking a declaration of the invalidity of the physical examination requirement above referred to, plus damages, attorney's fees and costs. Defendant filed numerous exceptions, all of which were overruled. It then filed an answer. Following a trial on the merits, the District Court rejected plaintiff's contentions on all points and dismissed both their individual and their class action at their costs. They appealed to this court.

The first issue to be determined by us is that of whether plaintiff was a tenured teacher or a probationary teacher, as if she was a tenured teacher her dismissal is conceded by the School Board to have been improper in any case. In this connection the facts show that plaintiff, who had previously taught in East Baton Rouge Parish and had acquired tenure there, began her teaching career with the Iberia Parish Schools in September of 1961. She taught there continuously until 1966, and therefore under LSA R.S. 17:442, she became a tenured teacher in Iberia Parish. In July of 1966, however, plaintiff withdrew from the Iberia Parish Schools, signing two written statements to the effect that she was withdrawing from teaching in the public schools of Louisiana and had no intention of returning to that profession. The statements referred to were signed in connection with the withdrawal of her accumulated contributions in the Louisiana School Employee's Retirement System,

and read as follows:

. . . . .

> I am not now employed and do not now expect to be employed again in the public schools of Louisiana. I inclose my certificate of membership.
>
> Signed Helen S. Pitcher (Mrs.)

> Dear Superintendent:
>
> I am not now employed and do not intend to be employed again in the public schools of Louisiana. Therefore, I desire to withdraw the accumulated contributions to my credit in the Louisiana School Employees Retirement System. In order for me to do this, it is necessary that you complete, sign, and mail to the office of the Retirement System this form. I shall very much appreciate it if you will do this for me promptly.
>
> Signed Helen S. Pitcher (Mrs.)

Nevertheless, plaintiff did return to teaching in the Iberia Parish School System in January of 1967, from which time she taught continuously until January 23, 1969, when the discharge now under consideration took place.

It is plaintiff's contention that under LSA R.S. 17:442 once tenure is acquired by a school teacher it is retained by such teacher for life, and

she cites the case of Hayes v. Orleans Parish School Board, 225 So.2d 131 (4th Circuit, 1969) as authority for her view. The Hayes case had nothing to do with a situation such as the one before us where a tenured teacher has resigned her position stating her intention never to return thereto, but rather deals with a situation in which a tenured teacher was promoted to a higher level and salary and was later demoted. Our brothers of the Fourth Circuit Court of Appeal, after stating that the problem before them was a determination of whether there is simply an initial three-year probationary period before acquiring tenure as a permanent teacher or there is a three-year probationary period for each new level or position attained, concluded that once a teacher has acquired tenure he is not required to serve a three-year probationary term in each new level of promotion attained. (We should note here that LSA R.S. 17:444 and 17:463 were amended in 1968 to, in effect, legislatively overrule the holding of the Hayes case.) We have been cited no cases, and have found none, which encompass the type of situation presently before us, where a teacher had voluntarily left the school system after acquiring status as a permanent or tenured teacher. Nevertheless, at 78 C.J.S., Section 180, verbo, School and School Districts, at page 1029, we find the following:

> "Where a teacher who has acquired classification as a permanent teacher resigns and leaves the school system, the classification does not

> survive, and the teacher is not thereafter entitled to be classified as a permanent teacher by reason of prior service."

That, we think is the proper rule to be followed in cases such as this. The undesirable consequences to which any other holding could lead are evident. In view of the stringent requirements set out in LSA R.S. 17:443 for the removal of such, it could well be argued that once a teacher has acquired tenure she could voluntarily terminate her employment with the School Board and then, after a period of time of any length, demand to be reinstated in her former position. Is the School Board then to make room for such a returning teacher, or principal, by discharging or demoting others of its employees who may themselves have acquired tenure in the meantime? Or we could ask whether a School Board has no right to test the ability of the teacher rehired after a period of perhaps twenty years, during which time she has done no teaching, simply because prior to her period of absence she enjoyed tenure in the schools of that parish. The havoc that affirmative answers to such questions would work on the school systems of our State and the consequent impairment of their function, are obvious, and we therefore conclude that when plaintiff voluntarily retired from the school system in 1966, and withdrew her share of the accumulated retirement benefits, she lost her tenure.

The second issue to be dealt

with is plaintiff's contention that even if she was a probationary teacher she was not discharged in accordance with law. LSA R.S. 17:442 provides in relevant part that:

> " . . . During the probationary term the parish or city school board, as the case may be, may dismiss or discharge any probationary teacher upon the written recommendation of the parish or city superintendent of schools, as the case may be, accompanied by valid reasons therefor.
>
> . . . . . "

It is true as contended by plaintiff that the letter to her from Claude O. Duhon, Superintendent of the Iberia Parish School Board, dated January 21, 1969, informing her that her employment would be terminated as of January 23, 1969, was not sufficient compliance with the above quoted statute as to make her discharge thereunder valid. The erroneous procedure, however, was of short duration as on January 29, 1969, Superintendent Duhon wrote a letter to the Iberia Parish School Board recommending dismissal of plaintiff on the grounds of neglect of duty for failure to comply with the rules and regulations of the Board. His recommendation for dismissal was taken up and approved at the February 12, 1969, meeting of the School Board and plaintiff, Mrs. Pitcher, was immediately notified in writing of the action taken by the Board. The School Board did not pay Mrs. Pitcher for the

period of January 23 to February 12, 1969, until June, 1969, when tender of a check for $600.00 covering one month's salary was made to her. The tender was refused but subsequently the trial court ordered that sum delivered to Mrs. Pitcher. Clearly, then, there was compliance with the provisions of LSA R.S. 17:442 if the reasons given by the Superintendent for the proposed dismissal were valid.

That brings us to the principal issue in this case, which is whether or not a parish school board has the right to require its school teachers and other personnel to submit to an annual physical examination by a physician of their choice, and to require that the said physician certify the fitness of the teacher or other employee to hold his or her position. That of course is the central issue because if the regulation requiring the physical examination, and certification, is not one which the School Board has a right to adopt and implement, there was an absence of valid reasons for the discharge of plaintiff. (There is no question of Mrs. Pitcher's ability as a teacher and her competence was established by the evidence.)

We quote now the forms which the examining physicians are to follow in making their examination. Only the bottom portion of the first form, beginning with "I have examined . . ." was to be returned to the School Board at the time that plaintiff was discharged, although when the School Board first

decided to require the physical examination the entire form was to be returned to it. That policy was abandoned, however, when the teachers protested, and it was decided that only the bottom portion should be made part of the School Board's records.

IBERIA PARISH SCHOOL BOARD PHYSICAL EXAMINATION FORMS

Name of Employee_____
Address_____
Age__ Sex: M_ F_ Height ____ Weight _____
Physical Fitness:

1. Eyes: Visual Acuity R___ L____
   Glasses Proper: Yes___ No _____
   Field of Vision _____
   Color-Blind (red-green)
2. Ears: Right _____ Left Ear _____
   Hearing: Right Ear __ Left Ear_____
3. Heart _____ Lungs _____
4. Blood Pressure _____
5. Urine Analysis _____
6. Evidence of Epilepsy, Diabetes, extremes or fluctuations in Blood Pressure, or ailments which might cause temporary loss of consciousness_____
   _____
7. Existing Communicable Disease (s)
   _____
8. Wasserman or Kahn Test _____
   Tuberculin Test _____
   Chest X-Ray _____
9. Amputation of Members: Arm _____
   Hand ____ Fingers ____ Leg _____
   Foot ____ Toes _____
10. Abnormal condition of spine _____
11. History of mental lapses; derangements, etc. _____
12. Use of alcohol, narcotics, drugs_____

13. History of illness during preceding years _____

I have examined _____ and find him/her to be free in accordance with the items listed above, from any ailments, disease, or defect that might affect his ability to perform his duties for the Iberia Parish School Board.

Date _____ Signed _____
Examining Physician

DOCTOR: Please mail this form to:
Iberia Parish School Board,
P. O. Drawer 520, New
Iberia, La. 70560

IBERIA PARISH SCHOOL BOARD

RE-CHECK OF BLOOD PRESSURE OR OTHER ABNORMALITY

Name _____ Age ____ Date _____
Heart and blood vessel examination done _____ for the above indicates
date
he _____, _____ unduly
is not is
susceptable cardiovascular accidents.
Pertinent findings _____
_____
_____
_____
_____
_____

_____ M.D.
Signature of Physician

The thrust of plaintiff's argument is that the School Board's requirement that she submit to the physical examination, under the above quoted form, and that the examining physician certify her fitness to teach, violates her constitutional right to privacy. She argues that the examination would make it necessary for her to divulge a number of personal matters such as what medication she takes, the extent of her use of alcohol or drugs, family histories of such hereditary diseases as epilepsy, etc., such non-communicable physical deficiencies as amputations, and other information which she regards as being unrelated to her proficiency, skill, or dedication as a teacher. In support of her views she cites certain jurisprudence, notably the case of Hamilton v. Lumbermen's Mutual Casualty Company, 82 So.2d 61 (First Circuit, 1955), writ refused, November 7, 1955, dealing with the individual's right to privacy. We do not lack familiarity with the right to privacy nor do we quarrel with same. We do opine, however, that reasonable interferences therewith, if properly authorized and taking place under proper circumstances, are not prohibited by either the law or the jurisprudence.

There is substantial evidence in the case at bar, in particular the testimony of Dr. J. L. Comeaux, a member of the School Board, and Dr. Murphy Martin, Director of the Parish Health Units in Lafayette, Iberia, and St. Martin Parishes, Louisiana, both medical doctors, to the effect that all of the points covered by the medical examination were

either directly or indirectly related to the teacher's ability to perform her duties either at present or in the near future. The latter consideration, while not directly or immediately derrogating from the teacher's efficacy, is certainly an important consideration which must be taken into account by the School Board in planning its personnel requirements. Thus there appears to be ample reason for requiring the physical examination.

The manner in which the School Board seeks to conduct it is designed to effectuate a minimal invasion of the teacher's privacy. The teacher is free to seek out a physician of her choice and the results of the examination are divulged to no one save the teacher. It is only the physician's ultimate conclusion, based on his findings and the history given him, that is made available to the School Board. Should the physician take an arbitrary position and refuse to certify the teacher as being fit to teach, there is nothing in the regulations to prohibit her from seeking out other, more tolerant physicians.

As a practical matter we note that of the 662 teachers that were employed in the New Iberia Parish School System at the time of plaintiff's dismissal only she refused to permit her physician to certify her fitness to teach. Both she and her physician, Doctor Oscar M. Alvarez, testified that she had in fact taken the physical examination and passed it. She would not, however,

permit Doctor Alvarez to mail his certification of her fitness to the School Board. We further note that plaintiff was in the habit of being tested for communicable diseases, such as tuberculosis, on a yearly basis in the past. Such tests, together with many of the other tests required in the physical examination, were avilable to the teachers free of charge at the Parish Health Units, thus minimizing the cost of the physical examinations required by the School Board.

There is a presumption of regularity and validity that attaches to the discretionary actions of school boards and limits the power of judicial review over such actions. Moffett v. Calcasieu Parish School Board, 179 So.2d 537 (3rd Circuit, 1965). Considering the evidence in view thereof, we are unable to hold that the regulation in question was so unsupported by reason as to exceed the power vested in the School Board, and hence we find no manifest error in the trial court's decision upholding the regulation. It is not within the power of the courts to substitute their views for those of a School Board when there is a rational basis for the latter's policies and determinations. Blanchet v. Vermilion Parish School Board, 220 So.2d 534, (La. App. 3rd Circuit, 1969). Having reached this conclusion we need not discuss the other points raised by plaintiff's appeal.

For the above and foregoing reasons the judgment of the District Court is affirmed at the costs of plain-

tiffs - appellants in both courts.

AFFIRMED.

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NO. 73-1035

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1973

MRS. HELEN PITCHER
AND MANSON PITCHER

Petitioners

V.

IBERIA PARISH SCHOOL BOARD

Respondent

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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MAY IT PLEASE THE COURT:

This brief will be concise and short. It will address itself to the principal issue raised by the petitioners, namely, whether the regulation adopted by the Iberia Parish School Board caused Mrs. Pitcher to be unconstitutionally deprived of her right to privacy.

The claim falls short of substantial merit. Petitioner complains of an indiscriminate denial of her right to privacy by requiring her to certify her medical fitness to perform her employment as a teacher. She claims that this would violate her right to privileged communications between she and her doctor. This argument, however, overlooks the essence of the question, namely, whether

the action of the Board is grounded in furtherance of a legitimate public interest for the children in the system and the functional ability of their teachers. The Board's role in requiring the examination amounts to nothing more than a precautionary exercise of its role as employer charged with the responsibility of staffing over 660 teaching positions. This certainly is a legitimate administrative function. The Board in this case was doing nothing more than any private employer expects and requires of employees in pre-employment and periodic health examinations. Only the conclusion of the physician on the teacher's fitness was submitted to the Board, not the detailed form setting forth personal histories and other private physical

matters. The School Board could not "compel" the teacher to undergo an examination. Proper recourse would be dismissal of the employee who places her own right of privacy before her employment continuity.

The requirement for medical examinations as a legitimate area of public concern has long been recognized by courts for public protection from the mentally ill, SCHWARTZ V. THIEL, 242 Cal. App. 2d 799, 51 Cal.R. 767, in preventing communicable diseases, SIMONSEN V. SWENSON, 104 Neb. 224, 177 NW 831, for legitimate scientific purposes, GRIFFIN V. MEDICAL SOCIETY OF NEW YORK, 7 Misc. 2d 549, 11 NYS 2d 109, and for the overriding interest of the government as to the welfare and fitness of its military personnel,

CLARK V. GUARACI, 29 Misc. 2d 791, 208 NYS 2d 564.

Clearly, therefore, the School Board has the right to require medical examinations from all of its personnel (as it did) to assure their fitness and competency to perform as well as to safeguard and protect the school children (and all of the other employees) from communicable disease and to make proper personnel assignments.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be denied.

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